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Homophobic Statements, a Bishop, and the Limits of Freedom of Expression. An In-Depth Commentary on ECtHR 31.08.2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 *

*Dichiarazioni omofobe, un vescovo e i limiti della libertà di espressione. Un commento approfondito su CEDU 31.08.2023, Amvrosios-Athanasios Lenis v. Greece, no. 47833/20 **

ABSTRACT: La decisione della Corte europea dei diritti dell'uomo del 31 agosto 2023, *Amvrosios-Athanasios Lenis v. Grecia* (n. 47833/20), è un ulteriore passo verso una giurisprudenza sempre più densa in materia di "hate speech" e di limiti della libertà di espressione. La proclamazione pubblica di dottrine religiose in conflitto con i valori degli Stati contraenti sanciti dalla CEDU è protetta in una certa misura dal diritto fondamentale della libertà di religione e di credo. Tuttavia, la qualificazione di una dichiarazione come religiosa non giustifica il "discorso d'odio". L'Autore mostra la tensione tra libertà di religione, libertà di espressione e protezione dalla discriminazione e analizza la decisione sullo sfondo dell'articolo 17 della CEDU (divieto di abuso dei diritti).

ABSTRACT: The decision of the ECtHR of 31.08.2023, *Amvrosios-Athanasios Lenis v. Greece* (no. 47833/20), is a further step toward an increasingly dense jurisprudence on "hate speech" and the limits of freedom of expression. The public proclamation of religious doctrines that are in conflict with the values of the contracting States enshrined in the ECHR is protected to a certain extent by the fundamental right of freedom of religion and belief. However, the qualification of a statement as religious does not justify "hate speech." The AUTHOR shows the tension between freedom of religion, freedom of expression, and protection against discrimination, and analyzes the decision against the backdrop of Article 17 of the ECHR (prohibition of abuse of rights).

SOMMARIO: 1. Preliminary Remarks - 2. The Concept of Hate Speech - 3. The Facts of the Case - 4. The Procedure and Reasoning of the Court - 4.1 The ECtHR's Preliminary Considerations on Fundamental Rights - 4.2 Legal assessment - 4.3 Some Remarks on (the Non-Invoked) Article 9 of the ECHR - 5. Concluding Remarks

1 - Preliminary Remarks

The freedom to practice religion also includes the freedom to testify religiously based moral concepts as part of the doctrine of faith. Even if this leads to conflicts with convictions that are shared by a majority of the population or that are particularly politically driven, religious freedom opens up a space of personal freedom within the state's legal system to represent divergent convictions. However, the diplomacy of



the Holy See increasingly recognizes religious freedom being endangered by an exaggerated view of state neutrality and that religious citizens are marginalized in social discourse¹. For this reason, the Holy See takes a rather critical stance towards the increasing expansion of the concept of “hate speech” in state and international legal systems. Even if, from a Christian perspective, discrimination against people or even incitement to violence on religious grounds is to be condemned without exception, there is a danger that the constitutionally and internationally guaranteed freedom of religion and belief will not be taken into account as an independent subjective right that must be weighed up in the event of a conflict.

The following commentary deals with a case which, at first glance, only raises the question of the limits of freedom of expression. The complainant, a Greek Orthodox metropolitan, has not alleged a violation of religious freedom. Nevertheless, the question of the extent to which the invocation of religious grounds can have an influence on the dogmatics of art. 10 of the *ECHR* is in the background. The fact that in this specific case hatred and incitement were actually spread in the name of the (Christian) religion does not change this in principle. Rather, the case helps to sharpen the boundary between legitimate religious practice and hate speech.

The Author writes from the perspective of an Austrian religious law expert. The secondary literature cited primarily therefore reflects the German-language discourse. This should not be understood as a restriction, but rather as a stimulus for international discussion.

2 - The Concept of Hate Speech

Alongside freedom of association and assembly² and freedom of conscience, religion or belief³, the freedom of expression protected by art. 10 of the *ECHR* is one of the central human rights prerequisites of a pluralistic and democratic society: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public Authority and regardless of frontiers”. According to Article 10 Paragraph 2 of the *ECHR*, the exercise of these rights is “subject to duties and responsibilities”. It follows that freedom of expression can be subject to restrictions. However, an infringement of the right is only legitimate

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¹ Cf. the address by the Permanent Observer of the Holy See to the United Nations in Geneva at the General Segment of the 55th Session of the Human Rights Council, 28.02.2024 (in nuntiusge.org/wp-content/uploads/2024/02/HRC-55th-Session-General-Segment.pdf) [24.07.2024].

² Cf. art. 11 of the *European Convention on Human Rights* (henceforth, *ECHR* or *Convention*).

³ Cf. art. 9 *ECHR*.



under strict and narrow conditions. State bodies may not restrict freedom of expression without a legal basis. Furthermore, the restriction must be “necessary in a democratic society.” This necessity may arise for reasons of national security, territorial integrity, or public safety. Restrictions may also be necessary to maintain order or prevent criminal offenses, to protect health or morals, to protect the reputation or rights of others, to prevent the disclosure of confidential information, or to safeguard the Authority and impartiality of the administration of justice. Beyond mere necessity, an interference must be proportionate in relation to the (legitimate) objective pursued and in an overall balancing of potentially conflicting rights.

According to the case law of the ECtHR, due to its central importance for democracy⁴, Article 10 of the *ECHR* also protects statements that “offend, shock or disturb the State or a section of the population”⁵. So at what point is a perhaps unsavory, even outrageous statement no longer covered by the fundamental right to freedom of expression? Are there certain expressions of opinion that do not fall within the scope of protection of freedom of expression from the outset? Or does freedom of expression encompass all types of statements, so that the national legal systems only legitimize encroachments on the fundamental right due to abuse, incitement and hate speech at the level of the barriers of Paragraph 2?

Although the term “hate speech” is widely used in social and political discourse⁶, a generally recognized legal definition is still lacking.

⁴ Cf. **K. PABEL**, *Die Konventionsrechte als Fundament der Demokratie*, in M. PÖSCHL, E. WIEDERIN (ed.), *Demokratie und Europäische Menschenrechtskonvention*, MANZ Verlag, Wien, 2020, p. 15.

⁵ ECtHR, 07.12.1976, *Handyside v United Kingdom*, no. 5493/72, no. 49.

⁶ A large number of national movements and campaigns are networked in the “No Hate Speech Movement” initiated by the Council of Europe. See www.coe.int/en/web/no-hate-campaign. [All online sources retrieved on 30.01.2024.]



There is no widely accepted definition in either international⁷ or Austrian⁸ law⁹. Furthermore,

“the case law of international human rights bodies fails to clearly define when a statement (still) enjoys the protection of freedom of expression and may therefore only be restricted under the conditions laid down in the Convention, and when it falls outside the protection of freedom of expression altogether with reference to its abuse of rights”¹⁰.

At the same time, under international law, there is a clear tendency toward states being obliged to prosecute at least serious forms of hate speech by law. Article 20 Paragraph 2 of the ICCPR already stipulates that any advocacy of national, racial, or religious hatred that incites discrimination, hostility, or violence shall be prohibited by law¹¹. These

⁷ See **A.K. STRUTH**, “Hate Speech” - Der Schutzbereich der Meinungsfreiheit nach Art. 10 EMRK und Grundrechtsmissbrauch nach Art. 17 EMRK, in CHR. GRAFL, B. KLOB, S. REINDL-KRAUSKOPF (ed.), “Das wird man wohl noch sagen dürfen!” Meinungsfreiheit und Strafrecht, Frankfurt, Verlag für Polizeiwissenschaft, 2018, pp. 91-94 with further references. Even if no actual definition can be determined, an increasing sharpening of the contours of the term can be observed. In sec 30 of the Federal Audiovisual Media Services Act (*Audiovisuelle Mediendienste-Gesetz - AMD-G*), in (*Austrian*) *Federal Law Gazette* I 84/2001, as amended by (*Austrian*) *Federal Law Gazette* I 150/2020, according to the Austrian Constitutional Court (VfGH), the legislator “distinguishes between communication content in audiovisual media services, which - summarized - are primarily subject to a ‘hate speech ban’, and content of audiovisual commercial communication, which must refrain from any discrimination on certain grounds or according to certain characteristics and may not promote such discrimination”: VfGH E2977/2021, 23.06.2022.

⁸ Cf. **B. SCHINKELE**, *Von der Religionsbeschimpfung zur “Hassrede” - einige Überlegungen*, in *Österreichisches Archiv für Recht und Religion* 2017, pp. 497-498, who speaks of a “general significance in relation to extremist expressions of opinion.” References to Austrian law are due to the author’s place of work (Vienna) and serve as examples. The case in question is based on Greek law. Together with a few cross-references to German criminal law, this article is intended to encourage comparative law studies without being able to provide one itself.

⁹ In Austrian jurisprudence, however, the problem is discussed time and again. Cf. **C. BEZEMEK**, *Hate Speech, Shitstorm und Dschihad Online: Müssen die Grenzen der Meinungsfreiheit neu vermessen werden?*, in W. BERKA, M. HOLOUBEK, B. LEITL-STAUDINGER (ed.), *Meinungs- und Medienfreiheit in der digitalen Ära: Eine Neuvermessung der Kommunikationsfreiheit*, MANZ Verlag, Wien, 2017, p. 43; **M.C. KETTEMANN, K. MOSENE**, *Hassrede und Katzenbilder: Ausgewählte menschenrechtliche Aspekte der Governance von Meinungsäußerungen im Internet*, in E. GREIF, S. ULRICH (ed.), *Hass im Netz - Grenzen digitaler Freiheit*, Trauner, Linz, 2019, p. 92.

¹⁰ **DEUTSCHER BUNDESTAG, WISSENSCHAFTLICHE DIENSTE**, *Sachstand WD 2 - 3000 - 055/15: Hassrede (hate speech) und Holocaust-Leugnung in der menschenrechtlichen Spruchpraxis*, No. 1.1.3. (in www.bundestag.de/resource/blob/485798/13870af2cbd422605e56121a9821a7f0/WD-2-055-15-pdf-data.pdf).

¹¹ *International Covenant on Civil and Political Rights (ICCPR)* of 16 December 1966, General Assembly resolution 2200A (XXI), published, for example, in: *Austrian Federal Law Gazette* 591/1978 as amended by *Federal Law Gazette* III 179/2022. In art. 4 (a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (for example in: [*Austrian*] *Federal Law Gazette* 377/1972 as amended by [*Austrian*] *Federal Law Gazette* III 172/2019), the signatory States undertake to “refrain from any



provisions not only stand alone, but also determine the correct interpretation of other provisions of international law, including the *ECHR*. According to Article 31 Paragraph 3 Subparagraph 3 of the *VCLT*¹², any rule of international law applicable in the relations between the contracting parties is to be used for the interpretation of international treaty provisions¹³.

In 1997, the Committee of Ministers of the Council of Europe attempted to define hate speech in more detail in a recommendation¹⁴. This definition includes

“[any] expression which propagates, incites, promotes or justifies racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed in the form of aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, immigrants and persons of immigrant origin”¹⁵.

Even though this definition is not legally binding, it is nevertheless linked to norms of international law that prohibit incitement to violence against persons with certain characteristics, the denial of human dignity on the basis of group affiliation or the denial of historically indisputable crimes against humanity, above all and incomparably the Holocaust.

In contrast to an insult, slander, or defamation of character, hate speech is linked to a person's membership in a group or is specifically directed against a particular group of people that can be differentiated by certain characteristics such as ethnic origin, religion, sexual orientation, or gender¹⁶. The intention is to belittle people on the basis of a particular characteristic. Hate speech always contains something violent, whether it is directly inciting violence or denying individual

propagation of ideas based on racial superiority or hatred and from any incitement to racial discrimination. III 172/2019”, the signatory States undertake to declare to be an offense punishable by law “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.” Cf. also art. 6 of the 1st *Additional Protocol to the Convention on Cybercrime*, concerning the criminalization of acts of a racist and xenophobic nature committed via the Internet and other digital networks, *ETS* no. 189 (in *rm.coe.int/168008160e*). With a view to the Austrian legal order cf. art 10 par. 2 of the *Vienna Convention* of 1955.

¹² *Vienna Convention on the Law of Treaties* (1969).

¹³ Cf. **Ch. GRABENWARTER**, “Hate Speech” - *verfassungsrechtliche und völkerrechtliche Aspekte*, in CH. GRAFL, B. KLOB, S. REINDL-KRAUSKOPF (ed.), *Das wird man wohl noch sagen dürfen!* Meinungsfreiheit und Strafrecht, Verlag für Polizeiwissenschaft, Frankfurt, 2018, pp. 67-78.

¹⁴ *Recommendation No. R (97) 20 of the Committee of Ministers to the Member States* of 30 October 1997 (in *www.egmr.org/minkom/ch/rec1997-20.pdf*).

¹⁵ Translation from **DEUTSCHER BUNDESTAG, WISSENSCHAFTLICHE DIENSTE**, *Sachstand WD 2 - 3000 - 055/15, 1.1.1*.

¹⁶ Cf. **A.K. STRUTHA, K. STRUTH**, *Hate Speech*, cit., p. 95 s. It is difficult to imagine introducing a closed catalog of frowned-upon criteria without making new discrimination possible. For example, the disparagement of immigrants in general or of welfare recipients can also constitute hate speech.



groups of people their humanity or full membership in society - with the effect that violence against these people may not have been directly intended, but an atmosphere was intentionally created in which violence thrives¹⁷.

Whether and at what point an expression of opinion turns into hate speech also depends on the communication context. It is true that there are no communicative contexts in which every form of hate speech is permitted. Nevertheless, a distinction must be made as to whether seeds of violence can be sown in a particular situation, or whether only a limited group of people can effectively learn and experience the expression of opinion. In the modern media society, however, anyone who makes a statement on social media must be aware that it can be widely spread very quickly¹⁸. The theoretical possibility that, under the conditions of modern media, practically any public statement can potentially go "viral" is sufficient to justify the particular danger of individual statements. However, if the person invoking freedom of expression could reasonably assume that their (inflammatory) statements could only be heard by a small group of people, this must be taken into account in an overall assessment. Statements on matters of public interest do not legitimize hate speech, but may enjoy particular protection¹⁹.

Austrian law²⁰ lacks an independent criminal offense entitled "hate speech." However, Section 283 of the *Austrian Code of Penal Law* (*StGB*) penalizes "incitement to hatred." If one summarizes the complex offense (sec 283 [1] no. 1 *StGB*), it is the incitement to violence against a group of persons or individual members of this group, which is accessible to many people and is defined according to the (existing or absent) criteria of race, skin color, language, religion or ideology, nationality, descent or national or ethnic origin, gender, disability, age, or sexual orientation. However, mere membership in such a group does

¹⁷ Accordingly, the approach of the ECtHR in the judgment of 14 January 2020, *Beizaras and Levickas v. Lithuania*, no. 41288/15, no. 125 (with reference to ECtHR, 09.02.2012, *Vejdeland and Others v. Sweden*, no. 1813/07, no. 55) is broad: "It [the Court, note] has also held that incitement to hatred does not necessarily require a call to commit acts of violence or other criminal offenses. Attacks on persons committed by insulting, ridiculing or defaming certain groups of the population may be sufficient for the authorities to support the fight against racist expression as opposed to freedom of expression exercised in an irresponsible manner." For the application of Art. 17 ECHR, the ECtHR does, however, require a specific incitement to violence. See below, 3.2.

¹⁸ For a critical view of a relativizing statement of the ECtHR in the case *Perinçek v. Switzerland*: Cf. **Ch. GRABENWARTER**, *Hate speech*, cit., p. 82.

¹⁹ Cf. ECtHR (GC), 15/10/2015, *Perinçek v. Switzerland*, no. 27510/08, no. 230.

²⁰ For a legal comparison for the German-speaking countries, cf. **D. WAKOLBINGER**, *Verhetzung im deutschsprachigen Raum - eine vergleichende Betrachtung*, in *Österreichisches Archiv für Recht und Religion*, 2013, p. 73. It is instructive to note that in German law, the possible group-specific discriminatory characteristics are formulated very broadly by the constituent element of the offense "parts of the population", so that hate speech against groups or members of groups that can be distinguished according to social, economic, professional or other criteria can also be punishable: cf. *ibidem*, p. 84.



not lead to protection under criminal law. Rather, the incitement to violence must be based precisely on the group membership²¹.

3 - The Facts of the Case

Born in 1938, *Amvrosios Lenis* was consecrated bishop of the Greek Orthodox Church in 1976 and elected Metropolitan of Kalavryta and Egialia in the northern Peloponnese peninsula in 1978²². As metropolitan, he holds an office that can be compared to a Catholic diocesan bishop. This makes him one of the highest representatives of the Greek Orthodox Church in Greece.

In December 2015, *Lenis* felt compelled to contribute (on his personal blog) to an ongoing²³ debate in the Greek parliament on the introduction of a law to organize civil partnerships for same-sex couples. The post was entitled "*The scum of society have reared their heads! Let's be honest: Spit on them!*"²⁴. The article went on to explain that the "we" referred to there did not have the right to judge people, as this was God's right. However, this "we" would have the right to judge and condemn unlawful actions by people. The bishop explicitly referred to the right to condemn "sinful acts." By using very harsh words, the bishop then referred to a commitment of a Member of Parliament to advocate the legal elimination of discrimination against same-sex partnerships. He qualified homosexuality as a deviation from the laws of nature, a social crime and a sin. LGBT-people and anyone who supports homosexuality are not normal people, but "the scum of society." Moreover, the bishop spoke of people with a mental and spiritual disorder who should be spat upon when encountered²⁵. Members of Parliament supporting LGBT*-

²¹ Verbal abuse is also punishable if it is made in a way that is likely to disparage or denigrate the group or person in public opinion (sec 283 [1] no. 2 *StGB*). There is an increased threat of punishment for incitement to hatred in a printed work, on the radio, or otherwise in such a way that it becomes accessible to a broad public (par 3). Sec 283 (4) *StGB* contains a catch-all offense for the dissemination of inciting statements or materials. The criminal liability of the inciting of approval, denial, gross trivialization, or justification of genocide, crimes against humanity, and war crimes, insofar as these have been legally established by a domestic or international court, is standardized separately (par 2).

²² Cf. **ORTHODOX RESEARCH INSTITUTE**, *Primates of the Orthodox Church* (in www.orthodoxresearchinstitute.org/hierarchs/greece/bios/bio_ambrose_metr_kalavryta.html).

²³ At the beginning of 2024 this debate is still ongoing. Cf. **E. PANAGIOTIDIS**, *Kommt die gleichgeschlechtliche Ehe in Griechenland? Die Widerstände sind gross*, in *Neue Zürcher Zeitung online* (12.01.2024) (in www.nzz.ch/international/streit-ueber-gleichgeschlechtliche-ehe-und-leihmutterchaft-in-griechenland-ld.1773802).

²⁴ ECtHR, 31.08.2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 5.

²⁵ It is not clear from the linguistic context whether this was a heavy metaphor or a call to actually spit on people. However, later in the article, the author quoted the Bible to emphasize his point. Cf. Psalm 104 (103), 35: "*Let sinners be consumed from the earth [...]*".



rights belonged to the “dregs of society,” were disturbed and were people of darkness.

The blog entry was picked up by several media outlets and thus also spread further online. As a result, the plaintiff felt compelled to post another article on his personal blog under the heading: “Let things be clear: love the sinner but take care of the sin”. There he clarifies that he was not calling for violence. The response to his first article in the media in this regard was a misunderstanding. He had merely criticized a politician. The expression “spit on them” was used as a metaphor for the, in fact, not much friendlier: “despise them”.

As a result of the first blog entry, the metropolitan was charged and convicted of “public incitement to violence or hatred” against people on the basis of their sexual orientation and of “abuse of a clerical office” under the relevant provisions of Greek criminal law²⁶. On appeal, he obtained a reduction of the guilty verdict to the fulfillment of the offense of “abuse of a clerical office,” combined with a suspended five-month prison sentence²⁷. According to the Court of Appeals, the metropolitan had expressed a political opinion and criticized individual members of parliament. However, he had written about his views on homosexuality in general terms. He had therefore addressed all homosexuals. The plaintiff’s right to freedom of expression was not violated by a criminal conviction, as his article was likely to provoke discrimination and hatred against homosexual people.

After the Greek Parliament voted against the separation of Church and State as recently as in 2019²⁸, the Greek Orthodox Church continued to fulfill the role of a State church. In accordance with Article 3 of the Greek constitution, it is the “predominant religion” of Greece²⁹. At the

²⁶ Cf. ECtHR, 31.08.2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 16-20.

²⁷ Austrian criminal law does not recognize the offense of “abuse of the clerical office”. In Greece, too, this offense has since been abolished following the ECtHR’s decision. The author is unable to answer whether the application of an offense that is only applicable to clergy does not in turn raise considerable equality concerns due to a lack of precise knowledge of Greek criminal law.

²⁸ Cf. **OSTKIRCHEN INFOPORTAL**, *Griechenland: Keine Trennung von Kirche und Staat in der Verfassung*, 18 December 2019 (in ostkirchen.info/griechenland-keine-trennung-von-kirche-und-staat-in-der-verfassung).

²⁹ Art 3 reads: “1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928. 2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph. 3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in



same time, Article 13 of the *Greek Constitution* recognizes the fundamental right to freedom of religion³⁰. Freedom of expression, as protected by Article 14 Paragraph 1 of the *Constitution*, is “subject to the observance of the law”. As a member of the Council of Europe, Greece is a state party to the *ECHR*.

Following the domestic conviction, the metropolitan appealed to the ECtHR, claiming that his right to freedom of expression (art. 10 *ECHR*) had been violated by Greece. The Court did not accept the application for a hearing on the merits, but rejected it as inadmissible *ratione materiae* pursuant to Article 35 Paragraph 3 letter a of the *ECHR*. Grounded on the reason of inadmissibility, complaints are dismissed that do not find a connecting factor in one of the rights protected by the *ECHR* and its additional protocols.

4 - The Procedure and Reasoning of the Court

4.1 - The ECtHR's Preliminary Considerations on Fundamental Rights

Before turning to the specific case, the ECtHR emphasizes the central importance of freedom of expression for a democratic society by making a number of fundamental doctrinal statements³¹. At the beginning, the Court refers to the aforementioned recommendation of the Committee of Ministers of the Council of Europe and to another recommendation of the European Commission against Racism and Intolerance³², an independent commission of the Council of Europe. Although these recommendations are not legally binding, together with international

Constantinople, is prohibited.” (English Translation in www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggllo.pdf).

³⁰ Art 13 reads: “1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs. 2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited. 3. The ministers of all known religions shall be subject to the same supervision by the State and to the same obligations towards it as those of the prevailing religion. 4. No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.” (English Translation in www.verfassungen.eu/griech/verf75.htm). Art 13 (5) concerns the oath.

³¹ On democracy as a central protected right under the *ECHR*, cf. **G. KUCSKO-STADLMAYER**, *Die demokratische Gesellschaft als Leitbild der EMRK*, in M. PÖSCHL, E. WIEDERIN (ed.), *Demokratie und Europäische Menschenrechtskonvention*, MANZ Verlag, Wien, 2020, p. 33.

³² **COMMISSION EUROPÉENNE CONTRE LE RACISME ET L'INTOLÉRANCE (ECRI)**, *Recommandation de politique générale no 7 du 13 décembre 2002 sur la législation nationale pour lutter contre le racisme et la discrimination raciale* (CRI(2003)8) (in rm.coe.int/recommandation-de-politique-generale-n-7-revisee-de-l-ecri-sur-la-legi/16808b5ab0).



reports³³ they do allow a more detailed assessment of the specific situation in which an expression of opinion can be qualified as hate speech.

The Court refers to the “Handyside” judgment from 1976, its leading decision on freedom of expression,³⁴ quoting its central passage:

“Freedom of expression is one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every human being. Subject to paragraph 2 of Article 10 [...], it applies not only to ‘information’ or ‘ideas’ which are favourably received or regarded as harmless or indifferent, but also to those which offend, shock or disturb the State or a section of the population. These are the demands of pluralism, tolerance and open-mindedness, without which there can be no ‘democratic society’. This means, among other things, that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed in this area must be proportionate to the legitimate aim pursued.”³⁵

The exceptions made possible by Article 10 Paragraph 2 of the ECHR must therefore be interpreted strictly, and the necessity to restrict the fundamental right must be convincingly justified. The Court deals with the question of whether the interference with freedom of expression is “necessary in a democratic society” in a broad casuistry. Even if a restriction should be proved to be necessary in a democratic society, it must be proportionate to the legitimate goal pursued³⁶.

Immediately following the fundamental statements on Article 10 of the ECHR, the Court brings the abuse clause of Article 17 of the Convention into play, thereby already indicating the further direction of its decision. The ECtHR refers here to the judgment in the case of *Perinçek v. Switzerland*, which has not gone unchallenged in some respects,³⁷ but was confirmed by the Grand Chamber of the ECtHR³⁸. The subject of these proceedings was the vehement denial of the Turkish genocide against the Armenians. The Court justified the overriding weight of freedom of expression with the social situation in Switzerland, where the culture of remembrance of the Armenian genocide is not a socially sensitive issue. The Court also justified its decision with the fact that more than 90 years have passed since the Turkish genocide³⁹. However,

³³ Data on the situation of LGBT* in Greece, to which the ECtHR refers, can be found in the *ECRI Report on Greece* (6th monitoring cycle) 2022 (in rm.coe.int/ecri-first-report-on-greece-adopted-on-28-june-2022-published-on-22-sep-2022/1680a818bf) as well as in the OECD report *Society at a Glance 2019 - OECD Social Indicators* (in www.oecd.org/social/society-at-a-glance-19991290.htm).

³⁴ ECtHR, 07/12/1976, *Handyside v. United Kingdom*, no. 5493/72.

³⁵ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), p. 36. The Handyside judgment is no longer cited despite the direct quotation and is therefore to a certain extent presupposed. In support of the case law on the narrow interpretation of the exceptions, the Court cites some older judgments.

³⁶ No. 37.

³⁷ Cf. **Ch. GRABENWARTER**, *Hate Speech*, cit., pp. 80 and 82.

³⁸ ECtHR (GC), 15/10/2015, *Perinçek v. Switzerland*, no. 27510/08.

³⁹ No. 250.



this argument is not entirely convincing. Using this logic, convictions under the Austrian Prohibition Act of 1947⁴⁰ could only be obtained with difficulty in just a few short decades⁴¹.

In the *Perinçek* judgment, the Court had confirmed its own case-law stating that art 17 ECHR can only be applied in exceptional cases:

“In cases concerning art 10 ECHR, recourse should only be had to art 17 ECHR if it is immediately clear that the disputed statements were intended to deprive art 10 ECHR of its true purpose by using freedom of expression for objectives contrary to the values of the Convention”⁴².

The abuse clause only comes into play if a complainant's statements incite hatred or the use of violence, and (!) if the complainant has thus attempted to invoke the Convention in order to engage in activities or actions aimed at destroying the very rights and freedoms enshrined in it. No one should be able to take advantage of the provisions of the ECHR (and its additional protocols) to carry out acts aimed at the destruction of rights and freedoms⁴³.

In the *Perinçek* case, it was not clear from the outset that an interference with freedom of expression was necessary in a democratic society, leading to the ECtHR's decision that the question of whether Article 17 of the ECHR should be applied, should not be considered at the stage of admissibility, but only when examining the justification of the interference under the second Paragraph of Article 10⁴⁴.

Despite its reference to this judgment, the ECtHR takes a different approach in the Greek metropolitan's case: the decisive factor in assessing whether verbal or non-verbal statements are removed from the protection of Article 10 by Article 17 of the ECHR is the assessment of whether the statements are directed against the values underlying the Convention⁴⁵. The Court did not break new ground by considering applying Article 17 when assessing the admissibility of the action and not only when examining the proportionality of a restriction. The previous case law is ambiguous. However, the point at which the abuse clause is applied has an impact on the protection of Convention rights⁴⁶.

⁴⁰ The *Prohibition Act* (“*Verbotsgesetz*”) adopted in 1947 (published in the *State Law Gazette* No. 13/1945 as amended by *Federal Law Gazette* No. 148/1992; a new amendment is currently before Parliament) not only imposes severe penalties for any form of re-engagement in National Socialism, but also prohibits the glorification, trivialization and denial of the Holocaust. The law is part of the Austrian constitutional order and forms an important building block of Austria's constitutional identity.

⁴¹ Cf. Ch. GRABENWARTER, *Hate Speech*, cit., 82.

⁴² ECtHR (GC), 15/10/2015, *Perinçek v. Switzerland*, no. 27510/08, 114.

⁴³ Cited is ECtHR, 01/07/1961, *Lawless v. Ireland*, no. 332/57, no. 7.

⁴⁴ ECtHR (GC), 15/10/2015, *Perinçek v. Switzerland*, no. 27510/08, no. 115.

⁴⁵ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 39.

⁴⁶ For the variant adopted here, see also ECtHR, 24 May 2018, *Roj TV A/S v. Denmark*, no. 24683/14, 30-38. For more details, see: A.K. STRUTH, *Hate Speech*, cit., p. 91-112. The author has already dealt with the question monographically: A.K. STRUTH, *Hassrede und Freiheit der Meinungsäußerung. Der Schutzbereich der*



4.2 - Legal assessment

The assessment of the facts by the national courts forms the starting point for the ECtHR's legal judgment. The ECtHR has confirmed that the Greek courts based their findings on an acceptable assessment of the relevant facts⁴⁷. Most of the applicant's statements did not concern individual politicians, but homosexual people in general. Even the statements that specifically addressed individual politicians were in fact directed against homosexual people in general. The crude criticism of the MPs who spoke out in favor of the introduction of a legally regulated civil partnership for same-sex couples could not be viewed in isolation but was directly related to the bishop's intention to disparage homosexual people. A retroactive clarification could not change the content of the original article⁴⁸.

The Court examines whether the national courts carried out a balancing exercise that also took into account the applicant's right to freedom of expression⁴⁹. A statement must appear to be an incitement to violence in its entirety, i.e. in view of the expressions used and the context⁵⁰. Here, the ECtHR agrees with the conclusions of the Greek courts that the statements in the first blog post should be qualified as hate speech against a group of people based on their sexual orientation. The statements had the potential to fuel violence against homosexual people and causing them fear and terror⁵¹. Even if offensive, hostile, or aggressive forms of expression of opinion may in principle be protected by Article 10⁵², harsh expressions that go so far as to deny homosexuals their human nature⁵³ and phrases such as "the scum of society, criminals, people of the dark, mentally ill people, defective and humiliated"⁵⁴ go beyond a protected expression of opinion⁵⁵.

Meinungsäußerungsfreiheit in Fällen demokratiefeindlicher Äußerungen nach der Europäischen Menschenrechtskonvention, dem Grundgesetz und der Charta der Grundrechte der Europäischen Union, Springer, Berlin, 2018.

⁴⁷ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 44.

⁴⁸ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, cit., no. 43.

⁴⁹ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, cit., no. 44.

⁵⁰ Reference is made to ECtHR, 16/03/2000, *Özgür Gündem v. Turkey*, 23144/93, no. 63.

⁵¹ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (Dec.), no. 46s.

⁵² Cf. ECtHR, 28/08/2018, *Sava Terentyev v. Russia*, no. 10692/09, no. 72.

⁵³ "They are not human!" "They are perversions of nature!"

⁵⁴ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (Dec.), no. 46s.

⁵⁵ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no.

47. Also quoted are the statements: "They are suffering mentally and spiritually! They are people with a mental disorder! Unfortunately, these people are worse and more dangerous than some of the people living in nuthouses."



Whether strong and aggressive criticism constitutes hate speech depends not only on the words used, but on the entire context of the communication. The Court examines “whether, on a reasonable interpretation and in their immediate or wider context, the statements may be regarded as a direct or indirect incitement to violence or as justification of violence, hatred or intolerance”⁵⁶. In the present case, the ECtHR recognized several incitements to violence, but mainly referred to the phrase “Spit on them!” This was clearly used in a literal sense⁵⁷. Many witnesses had testified that they had felt threatened as homosexual people. The publication and subsequent reproductions of the article had triggered feelings of fear in them. According to the Court, hate speech could be found throughout the entirety of the article⁵⁸.

A number of other factors were taken into account when assessing the context of the statement⁵⁹. Not just any member of the population, but a high official of the State church is invoking his personal fundamental right to freedom of expression here. According to the Court, the metropolitan has the power to influence not only his own congregation, but also the Orthodox majority of the Greek population. Furthermore, dissemination on the internet leads to an unlimited number of addressees, even if the actual blog is not recognized by many users. Thousands of people have been confronted with the statements and will continue to be confronted with them in the future, and if not through the original publication or a reproduction, then at the latest through the further dissemination of the statements in the media.

Finally, a third factor that underpins the qualification of the statements as hate speech is the particular vulnerability of the group targeted by the comments. Discrimination based on sexual orientation is just as serious as discrimination based on “race, origin or skin color”⁶⁰. According to the Court, gender and sexual minorities have “special protection against hateful and discriminatory speech because of the marginalization and victimization to which they have been and continue

⁵⁶ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 48 with reference to ECtHR (GC), 15/10/2015, *Perinçek v. Switzerland*, 27510/08, no. 209.

⁵⁷ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, cit..

⁵⁸ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, cit. This statement does not facilitate the delimitation of hate speech, as the originally required connection to violence is again abandoned. Immediately afterwards, the Court also states that the statements were hate speech and incitement to violence, which insinuates that there can also be hate speech without such incitement. Even in the abstract denial of the Holocaust, however, the core of hate speech is not a perverted view of history, but the reversal of victims and perpetrators or the insinuation that the victims invented or exaggerated the crimes against humanity perpetrated upon them. Cf. e. g. ECtHR, 03/10/2019, *Pastörs v. Germany*, no. 55225/14.

⁵⁹ Cf. ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 49-51.

⁶⁰ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 53 with reference to ECtHR, 09/02/2012, *Vejdeland and Others v. Sweden*, no. 1813/07, no. 55.



to be subjected in the past”⁶¹. This is particularly true in the Greek national context due to the low level of acceptance of homosexuals identified in the international reports cited.

Based on the qualification of the statements as hate speech, the ECtHR again brings art 17 ECHR into play. Once again, it emphasizes that this provision only applies as an exception and in extreme cases. In cases concerning art 10 ECHR, the standard should

“only be invoked if it is immediately clear that the disputed statements have sought to divert this article from its proper purpose by using the right to freedom of expression for purposes which are clearly contrary to the values of the Convention”⁶².

The Court then applies the general statements on art 17 ECHR to the present case without any further dogmatic endeavors: In the circumstances of the case and in view of the nature and wording, it was immediately clear that the statements were intended to remove art 10 ECHR from its proper purpose. The right to freedom of expression should not be used for purposes that are clearly contrary to the values of the Convention⁶³.

The comparison made by the Court of Justice in the *Lenis* case with the case of *Lilliendahl v. Iceland*⁶⁴ is important for the future legal assessment of homophobic hate speech. There, a 74-year-old citizen had posted an online comment on an article critical of a radio program which, in an open discussion with listeners, addressed a city council's decision to make LGBT issues more of a topic of teaching and counseling in primary and secondary schools in the future. *Lilliendahl* was convicted by the Icelandic courts for his statements⁶⁵. The Icelandic Supreme Court qualified the statements as “serious, severely hurtful and prejudicial,” an assessment that was endorsed by the ECtHR⁶⁶.

In the *Lilliendahl* case, the ECtHR distinguished between two forms of hate speech⁶⁷. Only in the most serious forms of hate speech

⁶¹ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 51 with reference to ECtHR, 12 May 2020, *Lilliendahl v. Iceland* (dec.), no. 29297/18, no. 45.

⁶² ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 52. The ECHR refers to several cases in which it has rejected the invocation of Art. 10 ECHR on the basis of art. 17 ECHR. The use of the right to freedom of expression, for example to deny the Holocaust, for anti-Semitic or islamophobic purposes or in cases in which violence was called for against all non-Muslims, was rejected.

⁶³ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 53.

⁶⁴ ECtHR, 12/05/2020, *Lilliendahl v. Iceland* (dec.), no. 29297/18.

⁶⁵ These are reproduced in the judgment (cf. no. 5) as follows: “We listeners of [Ú.S.] have no interest in any [expletive] explanation of this kynvilla [derogatory word for homosexuality, literally 'sexual deviation'] from [Ó.S.Ó.]. This is disgusting. To indoctrinate children with how kynvillingar [literally 'sexual deviants'] eðla sig [copulate, primarily used for animals] in bed. [Ó.S.Ó.] can therefore stay at home, rather than intrude upon [Ú.S.]. How disgusting.”

⁶⁶ ECtHR, 12/05/2020, *Lilliendahl v. Iceland* (dec.), no. 29297/18, no. 38s.

⁶⁷ ECtHR, 12/05/2020, *Lilliendahl v. Iceland* (dec.), no. 29297/18, no. 33.



(first category) does the application of Article 17 of the *ECHR* lead to the inapplicability of Article 10 Paragraph 1. This form of hate speech is characterized by incitement to violence. In addition, the applicant must have attempted to invoke the Convention in order to carry out an activity or act aimed at destroying the rights and freedoms enshrined in the *ECHR*⁶⁸. The second category of hate speech is also not protected by the Convention, but the examination is carried out within the framework of Article 10 Paragraph 2. The decisive factor is whether an interference with freedom of expression in a democratic society was necessary and proportionate in view of the objectives of par 2. If the facts of the case are clear, the complaint can also be rejected in this case. However, this is not done *ratione materiae*, which in a sense represents the sharpest sword, as it sharply separates the yes and no of the validity of the human right. The dismissal is then based on “manifest unfoundedness” (art 35 §§ 3 [a] and 4 *ECHR*).

In contrast to the *Lilliendahl* case, the ECtHR categorized the metropolitan's statements as the most serious form of hate speech in view of their seriousness and content. In the present case, it was immediately apparent that the applicant's statements were not only extremely harmful⁶⁹, but also intended to incite violence and hatred or to destroy the rights and freedoms protected by the Convention. This was particularly emphasized by the fact that a metropolitan - unlike the citizen *Lilliendahl* - is not a simple member of the public. The metropolitan had attempted to use the right enshrined in art 10 *ECHR* for purposes contrary to the values of the Convention⁷⁰. The application was therefore incompatible with the Convention, not because it was manifestly unfounded, but *ratione materiae*, and was dismissed under Article 35 Paragraph 3 letter a and Paragraph 4 of the *ECHR*.

4.3 - Some Remarks on (the Non-Invoked) Article 9 of the *ECHR*

The Court emphasizes that Article 17 of the *ECHR* does not per se exclude criticism of certain lifestyles on moral or religious grounds from the protection of the Convention's Article 10. Even if no explicit reference is made to Article 9 (freedom of religion or belief), the ECtHR indirectly

⁶⁸ “The decisive point under art. 17 is whether the applicant's statements sought to stir up hatred or violence and whether, by making them, he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it”: *ibidem*, no. 25.

⁶⁹ There, the Court ruled that although the statements qualified as hate speech, they did not contain any incitement to violence and were merely made by an “ordinary citizen” in a manageable context. ECtHR, 12 May 2020, *Lilliendahl v. Iceland* (dec.), no. 29297/18, no. 26 and 39.

⁷⁰ ECtHR, 31/08/2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 56 s.



expresses that the values protected there must also be included in the overall assessment of whether Article 17 of the *ECHR* shall be applied⁷¹.

The majority of the predominant religious communities have not kept pace with the changes in Western societies⁷² regarding the scientific evaluation and social acceptance of homosexuality, nor with other re-evaluations in the area of sexual and gender diversity. In this area, it is therefore not only the official Greek Orthodox doctrine that is ultimately in an irresolvable tension with the values of the Convention states. However, by protecting freedom of religion, this tension is part of the fundamental human rights web of the Convention itself⁷³. Within the limits of Article 9 Paragraph 2 of the *ECHR*, the guarantee of freedom of religion protects religiously based opinions, teachings and expressions of life that are in tension with other fundamental rights. Insofar as the religious teachings and the anthropology and ethics associated with it are critical of homosexual partnerships, a corresponding statement to a broad public constitutes an act of confession or teaching of the religion and is - at least in principle - protected under human rights by Article 9. As long as such a statement is made on a moral-abstract level, for example in defense of a traditional family image with regard to the philosophical-anthropological or religious reasons presented, there is no conflict with Article 17 of the *ECHR* in terms of admissibility. Otherwise, Article 17 would exclude the public confession of religious beliefs from the scope of protection of freedom of religion the moment that an individual does not feel that their way of life is accepted. All-round acceptance of all life plans is a socio-ethical ideal, but not a state that can be legally enforced.

However, the pluralistic, open-minded democratic society protected by the *ECHR* is based on the fundamental principle of tolerance. Religiously based criticism of other people's lifestyles must therefore not go so far as to deny people of other convictions their fundamental rights. Incitements to commit criminal offenses contradict the basic ideas of Article 10 Paragraph 2 of the *ECHR*, unless the criminal laws themselves should be in blatant contradiction to the fundamental values of the Convention.

Applied to the assessment of same-sex partnerships, this means that criticism or rejection is covered by the scope of protection of the fundamental right to freedom of religion if religious reasons are given as the basis for this statements. The dissemination of a religious statement is a more specific form of expression compared to expressions of opinion,

⁷¹ See **B. SCHINKELE**, *Von der Religionsbeschimpfung zur "Hassrede"*, cit., p. 497.

⁷² The Court emphasizes that the protection of human dignity and the value of people regardless of their sexual orientation is of great importance "in modern European society": ECtHR, 31.08.2023, *Amvrosios-Athanasios Lenis v. Greece*, no. 47833/20 (dec.), no. 55.

⁷³ Cf. **J. MARTÍNEZ-TORRÓN**, *Discurso de odio, injurias a la religión y moral pública en la jurisprudencia de Estrasburgo*, in J. MARTÍNEZ-TORRÓN, S. CAÑAMARES ARRIBAS, M. GONZÁLEZ SÁNCHEZ (ed.), *Libertad de expresión y libertad religiosa. Una perspectiva transatlántica*, Iustel, Madrid, 2023, p. 21.



which are generally protected by Article 10. If the criticism expressed exceeds the limits of tolerance - ultimately to be set by the Court of Justice - then an interference with the human right can also be justified under Article 9 of the *ECHR*. Article 17 also applies with regard to Article 9 if the exercise of religious freedom is carried out in a way that seeks to abolish the rights and freedoms laid down in the Convention or fundamentally contradicts these values.

Even more than in the case of Article 10 of the *ECHR*, the correct place to apply Article 17 is in the area of examining the legitimacy of the interference at the level of necessity and proportionality. An application that already excludes religious practices from the scope of protection of freedom of religion would force the Member States and ultimately also the Court of Justice into the role of religious arbiter. However, this would conflict with the religious and ideological neutrality of the Convention states, which is also based on the case law of the ECtHR⁷⁴.

In the case discussed here, however, the applicant failed to invoke Article 9 of the *ECHR*, which is perhaps surprising in view of his role as a metropolitan. The extent to which statements made by a high official of an established or recognized religious community in the exercise of his preaching or teaching office can constitute hate speech⁷⁵, did not, therefore, need to be examined further by the Court.

5 - Concluding Remarks

The ECtHR's decision to reject the application by the Greek Orthodox metropolitan *Amvrosios Lenis* is another milestone in the judicature to date that not only makes it easier for Member States to combat homophobic hate speech with all the means available under the legal system, but also increasingly obliges them to do so. By applying the abuse clause of Article 17 at the level of the scope of protection test, the Court has activated one of the strongest means available to it under the Convention. Following the distinction between two categories of hate speech developed in the *Lilliendahl* case, the metropolitan's statements were categorized as belonging to the first category.

The rejection of the application on the basis of an abusive invocation of freedom of expression is a strong signal that incitement to violence against persons of non-heterosexual orientation is on the same level as violence motivated by racism. By placing hate speech in this case on the same level as incitement to serious violence (bodily harm, death threats), the ECtHR clearly expresses its judgment that homophobic hate speech is unacceptable.

⁷⁴ Cf. ECtHR, 26.09.1996, *Manoussakis and Others v. Greece*, no. 18748/91, no. 47; ECtHR, 10.11.2005, *Leyla Şahin v. Turkey*, no. 44774/98, no. 107.

⁷⁵ Cf. C. CIANITTO, *Religious hate speech, libertà di religione e libertà di espressione. Intersezioni tra forma e sostanza dei diritti nella società multiculturale*, in *Stato, Chiese e pluralismo confessionale*, 2019/16, p. 28 s.



The call for violence against homosexuals did not only consist of the call to spit on them. A whole series of other statements were also violent. However, it should not be overlooked that, as intolerable as it is when a person is spat on for base motives, national criminal law only qualifies spitting as a less serious form of violence⁷⁶. If such a statement is already excluded from the scope of protection of freedom of expression by Article 17 of the *ECHR*, the distinction required in the *Lilliendahl* decision between hate speech that incites violence and “mere” hate speech becomes blurred. Since all hate speech has a violent aspect to it, the distinction becomes barely applicable. Even without explicit incitement to specific acts, third parties can be motivated by hate speech to commit acts of violence.

Although the Court refers to the *Perinçek v. Switzerland* case, it exceeds the standards laid down there and arrives at a different result in terms of fundamental rights doctrine: if the application of Article 17 results in the inapplicability of the rights enshrined in Article 10, then the questions of the necessity of the interference in a democratic society and of the proportionality of the interference to the legitimate objective pursued no longer arise. Why the ECtHR nevertheless examined both is then no longer really understandable. Based on the nationally established facts, it would have been sufficient for the Court to qualify the offense as particularly serious hate speech.

Excluding hate speech from the scope of protection of fundamental Convention rights is even more understandable the more clearly a statement incites violence. However, it is questionable at what point a statement is “directed against the values on which the Convention is based”. If one accepts the broad scope of protection of freedom of expression, which does not exclude shocking, disturbing and offensive statements from the outset, it must be possible to determine an exact limit, the crossing of which leads to the application of Article 17. Without such criteria, there is a risk that the prohibition of abuse of rights will turn from an exceptional provision into the “antithesis”⁷⁷ of the Convention rights. Such a criterion could be found in the case law on statements critical of religion or the Church. Article 10 Paragraph 2 of the *ECHR* allows Member States to restrict “statements which are gratuitously offensive to others and thus violate their rights, and which therefore do not contribute to a public debate likely to promote progress in human affairs”⁷⁸.

The goal of declaring homophobic hate speech to be incompatible with the fundamental values protected by the Convention under all

⁷⁶ Cf. the offense of insult by assault in sec. 185 (*German*) *StGB*; cf. sec. 115 (*Austrian*) *StGB*. The threshold for assault will rarely be reached. Sec 115 (*Austrian*) *StGB* also requires the offense to be committed in public or in front of several (at least 2) persons.

⁷⁷ **St. HINGHOFER-SZALKAY**, *Extreme Meinungen und Meinungsäußerungsfreiheit. Die Schranke des Artikel 17 EMRK*, in *Journal für Rechtspolitik* 2012, p. 106 s.

⁷⁸ ECtHR, 20.09.1994, *Otto-Preminger-Institut v. Austria*, no. 13470/87, no. 49.



circumstances⁷⁹ can also be achieved by applying Article 17 at the level of examination pursuant to Article 10 Paragraph 2. Here, again, the Court is not obliged to enter into a decision on the merits, as it is possible to dismiss the application on the grounds of manifest unfoundedness if all the relevant criteria are met. This option of applying Article 17 should be favored, as it is the only option that allows the context of a statement and any conflicting fundamental rights, such as freedom of religion and belief, to be taken into account in the overall decision. Since the justification test must take into account the necessity of an encroachment on fundamental rights in a democratic society and a proportionality test must be carried out, this also prevents national governments from attempting to withdraw fundamental rights protection from certain politically undesirable statements by invoking Article 17 of the *ECHR*⁸⁰.

The fact that there is hardly a context imaginable in which homophobic hate speech could not be legitimately prosecuted is in line with the case law of the ECtHR in both variants of the application of Article 17, and thus also forms a building block of the transnational resilience of Europe's democracies⁸¹. This also applies to those contracting States whose societies continue to have widespread problems with non-traditional family lifestyles, and it also applies to churches and religious organizations. They are within their rights to proclaim their teachings and confidently oppose a rash equation of the proclamation of religious morals and hate speech. However, the fact that hatred and violence do not belong in the toolbox of religious proclamation is a lesson of which all religions must take note. The fact that the case in question involved a high-ranking representative of a State church makes it obvious that there is no room for exceptions.

⁷⁹ According to the ECtHR, the protection of a pluralistic and open-minded democratic society legitimizes a special need to protect sexual minorities. Special protection is also required with regard to art. 8 *ECHR* (protection of private and family life). In the context of hate speech, this appears to be a circular argument, as the distinction between an individual insult and hate speech presupposes a reference to a specially protected group of people and that it is precisely because they belong to this group that they are being despised or incited to violence. Assigning homosexuals a higher need for protection than ethnic minorities, physically or mentally impaired people, religious minorities or, depending on the context, also women, appears to be an unnecessary hierarchization of possible victim groups.

⁸⁰ Cf. **St. HINGHOFFER-SZALKAY**, *Extreme Meinungen und Meinungsäußerungsfreiheit*, cit., p. 113. The ECtHR is well aware of this danger. Thus, in *Stomakhin v. Russia*, 09.05.2018, no. 52273/07, it relied on a broad interpretation of the scope of protection of freedom of expression: "In determining the scope of 'hate speech' offences, the domestic authorities must adopt a cautious approach and strictly interpret the relevant legal provisions in order to avoid excessive interference under the guise of the required action against 'hate speech' in cases where such allegations are made for mere criticism of the government or state institutions and their policies or practices." (Translation in *ris.bka.gv.at*, RS0134188.)

⁸¹ Cf. **U. WAGRANDEL**, *Transnationale Wehrhafte Demokratie in der EMRK*, in M. PÖSCHL, E. WIEDERIN (ed.), *Demokratie und Europäische Menschenrechtskonvention*, MANZ VERLAG, Wien, 2020, p. 69.

